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IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1983

GARY L. SHIVELY, Petitioner,

-vs-

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

HARLAN HELLER*
BRENT D. HOLMES
HARLAN HELLER, LTD.
1101 Broadway Avenue
Mattoon, IL 61938
217-235-0531
Attorneys for
Petitioner

*Counsel of record

QUESTIONS PRESENTED ¹

1. Whether the government may obtain handwriting samples by compulsory process, not for the purpose of establishing the identity of handwriting on documents to be introduced at trial, but for an ulterior motive not probative on the issue of identification.

2. Whether the government's refusal to disclose the results of its handwriting expert regarding an alleged effort by defendant to disguise true handwriting, the court's failure to order disclosure to defendant of a sealed affidavit which would have revealed the existence of such an opinion, and the court's denial at defendant's second trial of a continuance to provide defendant with an opportunity to obtain expert testimony to meet and rebut such conclusions presented by the government's

expert, either singly or in combination:

- (a) Violated petitioner's due process rights secured by the Fifth Amendment.
- (b) Was in violation of Rule 16 of the Federal Rules of Criminal Procedure and the court's own pre-trial order.

¹J. Winfield Pardee was a party defendant in the court of appeals.

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IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1973

GARY L. SHIVELY, Petitioner,

-vs-

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

Gary L. Shively, your petitioner,
prays that a writ of certiorari issue
to the United States Court of Appeals
for the Seventh Circuit to review a
decision of that court.

OPINIONS BELOW

The opinion of the court of appeals (App. infra, pp. 33-44) is reported at 715 F.2d 260. The opinions of the district court were not reported. The order denying a rehearing on appeal is found in App. A, infra, p.46.

JURISDICTION

The judgment of the court of appeals (App. A, infra, p. 45), was entered August 8, 1983. The petitioner's Petition for Rehearing was denied October 5, 1983 (App. A, infra, p. 46). The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES
INVOLVED

The Fifth Amendment to the
Constitution of the United States
provides in pertinent part as follows:

No person . . . shall be
compelled in any criminal
case to be a witness against
himself, nor be deprived of
life, liberty, or property,
without due process of law
. . . .

F.R.Crim.P. 16(a)(1)(D) provides
as follows:

Reports of examinations and
tests: Upon request of a
defendant, the government
shall permit the defendant
to inspect and copy or
photograph any results or
reports of physical or mental
examinations, and of
scientific tests or exper-
iments, or copies thereof,
which are within the possession,
custody or control of the
government, the existence of
which is known, or by the
exercise of due diligence may
become known, to the attorney
for the government, and which
are material to the prepara-
tion of the defense or are
intended for use by the govern-
ment as evidence in chief at
the trial.

F.R.Crim.P.16(c) provides as follows:

Continuing Duty to Disclose. If, prior to or during the trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

STATEMENT OF THE CASE

Your petitioner, Gary L. Shively, was charged by indictment with violation of 18 U.S.C. Sec. 656 (wilful misapplication), aiding and abetting G. Winfield Pardee in violating 18 U.S.C. Sec. 1014 (making a false statement on a loan) and with conspiracy to violate both above-cited sections while president of the First National Bank of Marshall, Illinois.

Prior to indictment, Mr. Shively on two separate occasions provided samples of his handwriting pursuant to government subpoena. Neither set of exemplars was used or needed in determining the identity of handwriting on documents bearing Mr. Shively's signature which the government introduced at trial, according to the FBI handwriting expert who testified in the second trial. This was because the government had already obtained from the bank numerous recent documents bearing the known signature and handwriting of Mr. Shively for comparison (R.297). Furthermore, throughout the proceedings, the authorship of Mr. Shively's signature on all of the documents material to the case was expressly stipulated (App. p. 43).

In the second trial, the government

was permitted to elicit testimony from its FBI handwriting expert that Mr. Shively had intentionally attempted to disguise his true handwriting when he provided the first set of exemplars. This expert opinion was contained in an affidavit the government had presented in support of a motion to compel Mr. Shively to provide a second set of exemplars (App. p.49). But this affidavit was ordered sealed by the judge at the request of the prosecutor. Thus, the attorneys for Mr. Shively were not even allowed to examine the affidavit during the pre-trial and trial proceedings, despite numerous specific requests for its production. Not until the case was on appeal did the district court "unseal" the affidavit.

The court entered a pre-trial discovery order, based upon F.R.Crim.P. 16, requiring the government to disclose

the results and reports of all
scientific tests and experiments . . .

"within the possession, custody
or control of the government, the
existence of which is known, or
by the exercise of due diligence
may become known, to the attorney
for the government."
(App. P. 47).

The duty of disclosure was made a
continuing one (App. p. 48). None-
theless, at no time before or during
either trial did the government produce
a report from its FBI expert regarding
his opinion of handwriting disguise,
despite requests by defense counsel for
all FBI reports.

At the first trial, no such
testimony regarding alleged handwriting
disguise was presented. The jury, in
notes passed to the judge during
deliberations, indicated that it was
deadlocked, although eight were in
favor of acquittal on two of the counts
with eleven in favor of acquittal for

Mr. Shively on the remaining count (see Vol. VI, p. 7). Failing to obtain an unanimous verdict from the jury, the judge declared a mistrial.

In the middle of the second trial, the prosecutor requested that the court permit him to introduce testimony regarding alleged handwriting disguise, indicating he had "case law" to support his position. The court, despite the stipulation admitting authorship of all documents bearing Mr. Shively's signature, permitted such testimony to be introduced. The court also denied defendant's request that the trial stand continued to permit defense counsel an opportunity to obtain expert testimony to meet and rebut that being offered by the government. Mr. Shively was convicted on all three counts at the second trial.

The court of appeals affirmed the convictions on two of the counts, but reversed the conviction under 18 U.S.C. Sec. 1014, holding that the government had failed to prove that the bank was insured by F.D.I.C., an essential element of the crime. (App. pp. 35-37).

REASONS FOR GRANTING THE PETITION

I.

For the first time, a federal appeals court has sanctioned the use of compulsory process, giving the government carte blanche power to obtain handwriting exemplars not for purposes of identifying documents, but for whatever ulterior motive the government may have in mind. By so holding, the court of appeals has parted company with the line of cases of this Court clearly restraining the production and use of such "real evidence" to non-testimonial identification and comparison of physical

properties.

In Schmerber v. State of California, 384 U.S. 757 (1966), this Court permitted the drawing of blood from a defendant for chemical analysis, finding this limited invasion of personal liberty and privacy to be outside the parameters of the Fifth Amendment self-incrimination clause. But the court was careful in delimiting the breadth of its ruling, noting:

There will be many cases in which a distinction is not readily drawn. Some tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort is made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the

principle that the protection of the privilege "is as broad as the mischief against which it seeks to guard." Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 198.

In the present case, however, no such problem of application is presented . . . Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the Petitioner, it was not inadmissible on privileged grounds. 384 U.S. at 765.

In Gilbert v. State of California,

388 U.S. 263 (1967), this Court held that the taking of exemplars is not a "critical" stage of criminal proceedings entitling the petitioner to the assistance of counsel. In concluding that counsel need not be present when the exemplars are taken from the accused, this Court declared:

If, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary

process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts.
388 U.S. at 267.

In that case, the Court was considering the situation which might arise if a handwriting expert falsely accused the defendant of authoring a robbery note or a forged document on the basis of an unrepresentative exemplar. It does not appear that the factual setting in Gilbert provided the majority with the occasion to consider the serious questions which would arise if the government attempted to use an exemplar to elicit expert testimony that the accused attempted to conceal true handwriting, thereby allegedly demonstrating evidence of guilt. However, Justice Fortas in his partially concurring and partially dissenting opinion (with whom the Chief Justice

joined) chose to discuss the dangers inherent in simply categorizing the taking of handwriting exemplars with the production of any other type of "real evidence." As he explained:

This is not like fingerprinting, measuring, photographing - or even blood-taking. It is a process involving the use of discretion. It is capable of abuse. It is in the stream of inculcation. Cross-examination can play only a limited role in off-setting false inference or misleading coincidence from a "stacked" handwriting exemplar. The court's reference to the efficiency of cross-examination in this situation is much more of a comfort to an appellate court than a source of solace to the defendant and his counsel. 388 U.S. at 292.

The government's own FBI handwriting expert in the instant case conceded that the exemplars were not used or needed to identify the handwriting on the bank documents bearing Mr. Shively's signature. Therefore, the only reason the government sought and obtained

compelled handwriting was in the hope its expert would review the samples and declare that there was an alleged effort to disguise true handwriting.

The analysis by the court of appeals on this issue is fatally flawed in several respects. It first suggests that the alleged attempt to disguise is the same as pouring a vial of blood down the drain. (App.P.43). Only if the defendant attempted to destroy the exemplars after preparing them would the analogy apply. Furthermore, there are clearly many reasons why a defendant might provide what an expert believes is an unrepresentative exemplar, interpreted by him to be an attempt to disguise. It might be due to the stress of being compelled to appear pursuant to federal grand jury subpoena, or the nervousness created by being confronted with federal prosecutors and FBI agents

without benefit of counsel. It could be due to the influence of medication, or finally, simply due to the fact that the handwriting of some people varies naturally from day to day or varies due to the kind of handwriting work being performed.

Finally, the court of appeals totally ignored the crucial fact that Mr. Shively should never have been compelled to give handwriting exemplars in the first place. The government did not seek these exemplars for use in identifying Mr. Shively's handwriting, the only constitutionally-valid reason for obtaining compelled handwriting exemplars.

We believe this Court is serious when it says that such samples should be used solely for purposes of

identification, thereby avoiding the serious Fourth and Fifth Amendment issues which would arise if the effort was directed toward some ulterior motive. The government never should be permitted to use compelled handwriting exemplars to generate implied or explicit testimonial evidence from the defendant. By allowing testimony as to an alleged attempt to disguise true handwriting, the government succeeded in having the jury conclude that the defendant thereby had made the implied statement, "I am attempting to conceal my handwriting because I am guilty, and this attempt to conceal expresses consciousness of that guilt."

Mr. Shively's right to be free from being a witness against himself and to be accorded due process of law was violated when the government (1) obtained compelled handwriting not

for purposes of identification, but for an ulterior motive, and (2) when such testimony was permitted to be presented before the jury. It has been held by at least one state reviewing court that an "unjustified compulsion to provide irrelevant handwriting exemplars would in our opinion violate due process." State v. Thomason, 538 P.2d 1080, 1087 (Ct.Crim.App.Okla., 1975).

The decision of the court of appeals in this case goes far beyond what any circuit has permitted by way of this kind of testimony. In fact, no other federal court has permitted such evidence to be presented unless the defendant has opened the door to the allowance of such testimony at trial or where it became important for the introduction of such evidence during cross-examination to explain an

expert witness's opinions or conduct. See United States v. Wolfish, 525 F.2d 457 (2d Cir., 1975), cert. denied, 423 U.S. 1059 and United States v. Stembridge, 477 F.2d 874 (5th Cir., 1973) where defense counsel opened the door by suggesting that the court-ordered exemplars were in fact the true handwriting of the defendant. None of the reasons for permitting such testimony existed in the instant case. Mr. Shively had stipulated to the authenticity of his handwriting, the exemplars were irrelevant to the presentation of the government's case, and the exemplars were not even used or needed to make the initial identification.

Although the court below acknowledged that this testimony added a "lurid note" to the trial, it found the testimony to be harmless error

(App. p. 44). It is hard to imagine how a reviewing court could have declared such testimony to be "harmless error" where the linchpin of Mr. Shively's defense was lack of criminal intent. In this case, this highly inflammatory and prejudicial testimony was not introduced during the first trial, and the jury nearly acquitted him in the absence of such prejudicial testimony. Where the entire thrust of the government's activities was to turn an unsuspecting and unwitting private citizen into a witness against himself in a criminal case by use of compulsory process, this Court should not hesitate to declare that these tactics offend the Constitution and our fundamental belief of what is just and right.

II.

A.

Both the trial court and the court of appeals sanctioned a patent, intentional violation of F.R.Crim.P. 16 and the pre-trial order, such that the supervisory power of this court should be utilized. Although the government had prepared an affidavit which was filed with the court, stating the claim that Mr. Shively had attempted to disguise true handwriting when he provided the first set of exemplars, the government concealed the contents of this affidavit from defense counsel. The concealment was successful because the affidavit was sealed by the court at the government's request throughout all pre-trial and both trial proceedings.

The purpose of Rule 16 is to provide

an orderly and adequate opportunity to inspect and examine relevant test reports, examinations and opinions. There is no question but that opinions regarding the results of handwriting analyses are encompassed within the rule. 2 Wright, Federal Practice & Procedure, Criminal, at 63, note 11 (citing Reznick, "The New Federal Rules of Criminal Procedure," 54 Geo.L.J. 1276, 1278 (1966)). See e.g. United States v. Shakur, 543 F.Supp. 1059 (S.D.N.Y., 1982) and United States v. Buchanan, 585 F.2d 100 (5th Cir., 1978).

Rule 16 should not be eviscerated by court rulings which acquiesce in patent and intentional violations of the rule. Other courts have not countenanced such tactics. See United States v. Padrone, 406 F.2d 560 (2d Cir., 1969) where the court reversed a conviction and ordered a

new trial where the government inadvertently failed to produce a copy of a three-page statement made by the defendant, a violation of the pre-trial order. In the instant case, knowledge of the expert's opinions, coupled with the knowledge that the court would permit such testimony at trial, would have allowed Mr. Shively sufficient time to obtain expert testimony to meet that offered by the prosecution.

B.

It was a violation of due process and fundamentally unfair and unjust for the government to be allowed to present such testimony regarding an alleged attempt to disguise handwriting without giving Mr. Shively an opportunity to meet and rebut such testimony with expert testimony of his own. Mr. Shively had a right to rely upon the

stipulation which had been entered into by the parties regarding the authorship of his signature. Thus, when the trial court for the first time ruled in the middle of the second trial that it would allow the government to introduce such testimony, at the very least Mr. Shively was entitled to have the matter stand continued so that an expert could be employed to evaluate the questioned signatures in order to meet and rebut the government's evidence.

The lower court's action was a complete departure from the Second Circuit's holding in United States v. Kelly, 420 F.2d 26 (2d Cir., 1969). Since the government did not disclose the results of a neutron activation test until trial, the court held that the defendant should have been given a continuance at the end of the

government's case to conduct his own tests, declaring:

Indeed, it is important that the defense be given a chance to research the techniques and results of scientific tests taken by the government. And Rule 16(g) F.R.Crim. P. indicates that the prosecution had a continuing duty under the February, 1968 Order to come forward with new scientific tests it made. See 8 Moore Federal Practice 2nd Ed., Sec. 16.05[3]. . . The course of the government smacks too much of a trial by ambush, in violation of the spirit of the rules. 420 F.2d at 28-29.

See also Perkins v. LeFevre, 642 F.2d 37 (2d Cir., 1981) (prosecutor failed to provide the records showing the prior convictions of a prosecution witness). A flagrant, knowing violation of Rule 16 and the pretrial order, coupled with a denial of the defendant's right to a fair opportunity to obtain expert testimony to rebut the government's surprise testimony,

deprived Mr. Shively of due process afforded him by the Fifth Amendment. The court of appeals suggested that a continuance during the second trial would have been "disruptive." However, a matter of convenience is hardly a sufficient reason to have permitted the defendant's right to a fair trial to be discarded, especially when the entire trial took barely two and a half days to complete.

III.

If this and other courts determine that the government is entitled to compel handwriting samples from private citizens by compulsory process and use those results to claim that the defendant was attempting to disguise or conceal his handwriting when giving those samples, then it is clear that such testimony is being offered not

for identification purposes, but for testimonial purposes. Under these circumstances, at the very least a party is entitled to be clearly advised prior to the providing of these exemplars that "any effort to disguise or distort true handwriting will be used as testimony against him in court."

Only in this way can the taking of these exemplars comply with the dictates of due process and the privilege against self-incrimination as set forth by this court in Miranda v. State of Arizona, 384 U.S. 436 (1966). No such explicit warning was given in the instant case and -- without it, due process is not satisfied and the Fifth Amendment privilege against self-incrimination could not be intelligently exercised.

CONCLUSION

Wherefore, it is requested that
the Petition for Writ of Certiorari
be granted.

Respectfully submitted,

Harlan Heller *
Brent D. Holmes
Attorneys for Petitioner,
Gary L. Shively

*Counsel of record.

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In the
United States Court of Appeals
For the Seventh Circuit

No. 82-2192

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GARY L. SHIVELY,

Defendant-Appellant.

No. 82-2436

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

G. WINFIELD PARDEE,

Defendant-Appellant.

Appeals from the United States District Court for the
Southern District of Illinois, Benton Division.
No. 82 CR 40006—James L. Foreman, Judge.

ARGUED MAY 11, 1983—DECIDED AUGUST 8, 1983

Before CUDAHY and POSNER, *Circuit Judges*, and
ROSENN, *Senior Circuit Judge*.*

* Hon. Max Rosenn of the Third Circuit, sitting by designation.

POSNER, *Circuit Judge*. Messrs. Shively and Pardee were convicted of bank fraud and appeal on a variety of substantive and procedural grounds.

Shively was the president of the First National Bank of Marshall, Illinois, a small country bank. His troubles began when he bought (from the chairman of the board of the bank) a lot on which to build a house for himself. He entered into an oral agreement with a contractor to build the house for \$80,000 and got a commitment from another bank for a \$64,000 mortgage. The commitment enabled him to get interim financing. But in the course of construction it became clear that the house would cost much more than expected, and though Shively was able to get the mortgage commitment raised to \$80,000 he came up \$20,000 short on being able to finance the construction. Unable to obtain additional loans from any bank or other financial institution, Shively turned to Pardee, a partner in a firm called Design Plus which was doing some work for Shively's bank. Shively asked Pardee to make him either a personal loan for \$20,000 or a loan from Design Plus for this amount. When Pardee refused, Shively asked him whether he would borrow \$20,000 from the bank and relend it to him. Pardee agreed and Shively prepared a promissory note stating that the loan was for "business expense and marketing operation." Shively then called Pardee and told him the bank had approved the loan. Pardee testified that he asked Shively whether the bank's board of directors understood "that I am going to get the money and it's going to be given back to you," and Shively responded, "Everything is okey dokey." Pardee signed the note, received the money, deposited it in another bank, and signed an agreement with Shively to lend him \$20,000.

Shively had not told anyone at the bank the true purpose of the loan to Pardee, and in fact had approved it on his own authority without submitting it to the loan committee or board of directors. The promissory note came due two years later but in the interim Design Plus had gone broke, to be followed shortly by Pardee. Pardee told the bank he would repay the note when Shively repaid

him. This was when the bank first learned of the true purpose of the loan to Pardee. That loan has never been repaid, though Shively has partially repaid Pardee's loan to him.

Shively and Pardee were tried together. The jury convicted Pardee of having falsely stated the purpose of the loan, in violation of 18 U.S.C. § 1014, and of having conspired with Shively to violate both 18 U.S.C. § 656 (willful misapplication) and 1014, but it acquitted him of having aided and abetted Shively in violating section 656. The jury convicted Shively of having aided and abetted Pardee in violating section 1014, of having conspired with Pardee to violate sections 656 and 1014, and of having violated section 656 by concealing from the bank that the proceeds of the loan to Pardee would be used by Shively himself.

The false-statement statute, 18 U.S.C. § 1014, provides: "Whoever knowingly makes any false statement . . . for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation" shall be guilty of a crime. There is no question that by signing a promissory note which contained a statement that he knew was false (that the purpose of the loan was "business expense and marketing operation") Pardee was making a false statement within the meaning of the statute. Whether his purpose was to influence the bank's action is at least doubtful, as we shall see. What is not doubtful is that the government failed to prove beyond a reasonable doubt that the First National Bank of Marshall was insured by the FDIC in 1978 when the false statement was made.

The only evidence of insured status that was introduced was a certificate of insurance that the FDIC had issued to the bank in 1969. The certificate states only that the bank was insured on that date. No evidence was presented, as in *United States v. Skiba*, 271 F.2d 644, 645 (7th Cir. 1959), that the bank was still operating under the certificate at the time of the offense. Even if *United States v. Crisp*, 435 F.2d 354, 360-61 (7th Cir. 1970), deliberately

omitted mention of that qualification (that there must be evidence bringing the certificate up to date) in citing *Skiba*, it is readily distinguishable. The issue in *Crisp* was venue, which the government need only prove by a preponderance of the evidence, see, e.g., *United States v. Bowdach*, 414 F. Supp. 1346, 1356 (S.D. Fla. 1976), *aff'd*, 561 F.2d 1160 (5th Cir. 1977)—not whether an element of the offense had been proved, as in this case and *Skiba*.

United States v. Platenburg, 657 F.2d 797, 799 (5th Cir. 1981), reversed a conviction under section 1014 because the only evidence of insured status was a seven-year-old certificate of insurance; here it was nine years old. Although the bank in *Platenburg* was not a national bank as in this case, and national banks are required by law to be insured by the FDIC, 12 U.S.C. §§ 1814(b), 1818, you cannot infer from the fact that someone is required by law to do something that he has done it. True, cancellation of federal deposit insurance for failure to pay the annual assessments (premiums) required by 12 U.S.C. § 1817(b), or for any other reason, is not automatic; it requires following the procedures laid down in 12 C.F.R. §§ 308.23-.31 (1983). Still, a national bank like any other can lose its insured status.

United States v. Knop, 701 F.2d 670, 672-74 (7th Cir. 1983), this circuit's most recent statement on proof of insured status, bank officers testified at the trial that the bank "is" insured. "Taken woodenly and literally the testimony might seem to refer only to the time of the trial. In context it could plausibly have been taken by the jury as referring to the time of the commission of the offenses" *Id.* at 673 (footnote omitted). See also *United States v. Safley*, 408 F.2d 603, 605 (4th Cir. 1969). But there is no way in which a certificate of insurance issued in 1969 could be taken to refer to a bank's insured status in 1978 without any other evidence. Although a stipulation between the parties recites that the Marshall bank was insured in 1978, the government did not introduce the stipulation into evidence. As a result, the record contains no evidence—beyond the stale 1969 certificate which just as unaccountably *was* placed in evidence—of

an essential element of a section 1014 offense. We are given no reason other than inadvertence why the stipulation was not introduced; *Platenburg* had been decided the year before the trial in this case. Pardee must be acquitted of the charge of violating section 1014 and Shively of aiding and abetting that violation.

The problem of insured status does not arise with respect to section 656, which provides: "Whoever, being an officer . . . or employee of . . . any . . . national bank . . . willfully misapplies any of the moneys . . . of such bank" shall be guilty of a crime. Shively argues that he could not be guilty of misapplication when the bank could have looked to Pardee, the nominal borrower and a man of substantial means at the time, for repayment of the loan the proceeds of which ended up in Shively's pockets. This would be a tenable argument if Shively, the ultimate borrower, had not been an employee of the bank. *United States v. Gens*, 493 F.2d 216, 222 (1st Cir. 1974); *United States v. Gallagher*, 576 F.2d 1028, 1045-46 (3d Cir. 1978). But it has been held to be misapplication per se for a bank officer or employee to funnel funds to himself by making a bank loan to a third party. *United States v. Krepps*, 605 F.2d 101, 106-08 (3d Cir. 1979); *United States v. Steffen*, 641 F.2d 591, 597 (8th Cir. 1981).

The meaning of "willful misapplication" in section 656 has long been a subject of debate and uncertainty. See *United States v. Docherty*, 468 F.2d 989, 992-95 (2d Cir. 1972). At the very least, however, the term must require that the bank's money have been used for a purpose that the bank would not have agreed to had it known what the purpose was. In *Gens*, for example, it was entirely possible that if the defendant's superiors in the bank had known that the nominal borrower intended to hand over the money to a third party to whom the bank would not have loaned the money directly, the bank would still have approved the loan, trusting to the credit of the nominal borrower; banks often lend money to small-loan companies whose customers they would never lend money to directly. But the Marshall bank would never have loaned Pardee money to hand over to the bank's president, no

matter how sterling Pardee's credit was at the time. With Pardee's company not only a contractor of the bank but a borrower from it on other loans, his acting as a conduit for funds to the bank's president created a conflict of interest and placed the bank in serious jeopardy of violating the legal limitations on lending to its own officers. See 12 U.S.C. § 375a; 12 C.F.R. §§ 215.3(a)(8), 215.4(b) (1983); *Adato v. Kagan*, 599 F.2d 1111, 1117 (2d Cir. 1979). There is no law against a bank customer's lending to a bank officer, but Pardee refused to lend Shively his own money; and the bank would not wittingly have helped Pardee get a hold over Shively by providing Pardee with money to lend to Shively.

This is not to say that every unauthorized loan by a bank officer is a willful misapplication of bank funds. Concerned with the reach of this criminal statute if read so broadly, and mindful that the statute originally required proof of intent to "injure or defraud" the bank or "deceive" a bank officer and that these words were dropped by a reviser without intent to alter the meaning of the law, courts including our own have read these words back into section 656. *United States v. Docherty*, *supra*, 468 F.2d at 994-95; *United States v. Larson*, 581 F.2d 664, 667 (7th Cir. 1978); see *United States v. McAnally*, 666 F.2d 1116, 1119 (7th Cir. 1981). But it is clear that Shively in loaning the bank's money to Pardee did intend to defraud the bank, by getting money from it for his personal use which the bank would not have permitted had it known the circumstances.

Although there thus was enough evidence to convict Shively of violating section 656, we must consider whether either he or Pardee could be convicted of conspiring to violate sections 656 and 1014, as charged in the indictment, when neither could be convicted of a completed offense under section 1014 because of the government's failure to prove insured status. Since no instruction was asked or given requiring that the jury, to convict of conspiracy, find that the objective of the conspiracy was to violate both statutes rather than either, maybe there was just a harmless variance between pleading and proof. Cf.

United States v. Brown, 521 F. Supp. 511, 520 and n. 6 (W.D. Wis. 1981). But assuming the government had to prove a conspiracy to violate section 1014 as well as section 656, we think it succeeded. "[I]t does not matter that the ends of the conspiracy were from the beginning unattainable." *United States v. Giordano*, 693 F.2d 245, 249 (2d Cir. 1982). See *United States v. Waldron*, 590 F.2d 33, 34 (1st Cir. 1979); *United States v. Rose*, 590 F.2d 232, 235-36 (7th Cir. 1978); *United States v. Senatore*, 509 F. Supp. 1108, 1110-11 (E.D. Pa. 1981); LaFave & Scott, Handbook on Criminal Law 475 (1972) ("the conspiracy cases have usually gone the simple route of holding that impossibility of any kind is not a defense"). Although *Platenburg* dismissed the conspiracy charge along with the substantive charge, it did so without any separate discussion of the former; and the impossibility of committing the substantive offense is no more a defense to conspiracy in the Fifth Circuit than anywhere else. See *United States v. Alpert*, 675 F.2d 712, 715 (5th Cir. 1982).

This is not to say that the government can use the general federal conspiracy statute (18 U.S.C. § 371) to punish all conspiracies to defraud banks, just because most banks are federally insured. But it is enough if the bank is insured although the defendants do not know it, see *United States v. Feola*, 420 U.S. 671, 676 n. 9 (1975); the federal concern with punishing the conspiracy in such circumstances is clear. And it is also enough if the defendants intend to defraud a federally insured bank, even though, unbeknownst to them, the bank has lost its insurance. That would be like a conspiracy to transport stolen property worth more than \$5,000, which *Carlson v. United States*, 187 F.2d 366, 369-70 (10th Cir. 1951) (discussed approvingly in our circuit's decision in *Rose*, *supra*, 590 F.2d at 236), held was proved by showing that the defendants intended to steal property of that value although the actual value turned out to be less. The evidence that the defendants in this case intended to defraud a federally insured bank was strong. The bank, as they well knew, was a national bank, required by law to be federally insured; it had once been insured; it continued

to represent to the public that it was insured; and for all anyone knew at the time of the offense it still was insured (in fact it still was, though the stipulation to that effect was not placed in evidence). Proof that it was insured during the period of the conspiracy was therefore not required to sustain the conspiracy convictions.

Assuming, still, that the conjunctive wording of the conspiracy charge matters, there was enough evidence to convict Pardee of having conspired with Shively to violate section 656 as well as section 1014—conspired, that is, to misapply bank funds. Pardee had substantial experience in the banking business, having been a director, an executive vice-president, and, briefly, the president of a bank. Unlike the borrower in *Docherty, supra*, 468 F.2d at 995, he knew—or so the jury could have found—that the promissory note falsely stated the purpose of the loan. And with all his banking experience he must have known that the bank would not knowingly have loaned him money for the use of a bank officer, and therefore that he was participating in a scheme to defraud the bank. It is unimportant whether he did so out of pure friendship, or, as is more likely, to ingratiate himself with the officer of a bank with which he did business both as supplier and as borrower. Although we have no reason to question the truth of Pardee's testimony that Shively told him, "Everything is okey dokey," Shively may have meant no more than that the bank had agreed to the loan, as distinct from the bank's having known of the ultimate, and improper, destination of the loan proceeds. Finally, the fact that the jury acquitted Pardee of aiding and abetting Shively's violation of section 656 does not invalidate his conviction for conspiracy. A jury is allowed to go easy on a defendant by acquitting him on one count even though consistency might require either conviction on that count or acquittal on all counts. See *United States v. Heller*, 625 F.2d 594, 597 (5th Cir. 1980).

Only two of the procedural issues have enough arguable merit to warrant discussion. One is whether the trials of Shively and Pardee should have been severed. Severance is argued in almost every case where there are

multiple defendants, and appellate courts give the argument short shrift, regarding it as a matter within the discretion of the trial judge. E.g., *United States v. Cavale*, 688 F.2d 1098, 1107 (7th Cir. 1982); *United States v. Hedman*, 630 F.2d 1184, 1200 (7th Cir. 1980); *United States v. Johnson*, 478 F.2d 1129, 1131 (5th Cir. 1973) ("a defendant has an extremely difficult burden of showing on appeal that the lower court's action was an abuse of discretion"). On the one hand, there is considerable cost to the government in having to conduct two or more separate trials arising out of the same criminal transaction; on the other hand, a joint trial may prejudice some or conceivably all of the defendants by confusing the jury. The balancing of these considerations is better done by the trial court than by the appellate court because the trial court has a better feel for the ability of a jury to assimilate evidence without confusing the defendants with one another. Another reason for limited appellate review is that, to avoid costly mistrials, the decision whether to sever should if possible be made before trial, and therefore at a time when there is no record on which to base informed appellate review of the decision.

The usual argument for severance is that the defendant seeking it would be prejudiced by being tried together with guiltier defendants with whom he might be merged in the jurors' minds. The main argument here is different. Shively, the guiltier of the two defendants, moved for severance on the ground that Pardee's defense was so antagonistic to his own that once he knew Pardee would take the stand he had to do likewise; thus his right under the Fifth Amendment not to be compelled to incriminate himself was infringed.

This argument has little to do with the issue of improper joinder as ordinarily presented. The argument is not that the jury was unable to separate Shively's case from Pardee's. It is not an argument about jury confusion at all, but a pure Fifth Amendment argument, and not a good one. Circumstances—a cogent prosecution witness, or a codefendant who is trying to exculpate himself at the defendant's expense—often force a defendant to take the

stand in his own defense; yet there is no infringement of the Fifth Amendment. If the government had given Pardee immunity and then called him to testify against Shively, thus putting pressure on Shively to testify on his own behalf, Shively could not complain that his Fifth Amendment rights had been violated. No more can he complain about joinder on this ground.

But Shively also casts his argument for severance in a more conventional form by appealing to a line of cases which hold that if codefendants have inconsistent defenses severance must be granted if—but only if—the defenses “conflict to the point of being irreconcilable and mutually exclusive.” *United States v. Crawford*, 581 F.2d 489, 491 (5th Cir. 1978). See, e.g., *United States v. Kopituk*, 690 F.2d 1289, 1316 (11th Cir. 1982). The danger is that in a case of irreconcilable and mutually exclusive defenses the jury is quite likely to convict at least one of the defendants without carefully weighing the evidence of his guilt. This is not such a case. The principal discrepancy between the two defendants’ stories was that Pardee testified that Shively had assured him that the loan was authorized even though the proceeds were intended for Pardee; this falls short of the type of conflict of which cases like *Crawford* and *Kopituk* speak. At all events, we do not think that Shively was made appreciably worse off by being tried with Pardee. Pardee made a rather appealing defendant since he had not profited personally from the various crimes that were charged and some of the jury’s expected sympathy for him might have lapped over to Shively. More important, Shively’s story which Pardee contradicted—that the loan was a bona fide loan for Pardee’s business needs, unrelated to Pardee’s personal loan to him—was incredible, and would not have been believed even if Pardee had not testified.

The last issue we discuss relates to the government’s use of samples of Shively’s handwriting. Before Shively’s first trial (which ended in a hung jury), he had been ordered to supply the government with samples of his signature, and had complied. The government hired an expert who concluded that Shively had attempted to dis-

guise his handwriting. The government wanted to present the expert's testimony at the first trial but the district judge refused to allow it. At the second trial the judge, after careful analysis, reversed his ruling, and the expert testified. At both trials the authenticity of Shively's signature on all the documents material to the case was stipulated, so that the expert's testimony was not for identification but to show that Shively had disguised his handwriting, thus betraying consciousness of guilt. Shively argues both that this testimony violated the Fifth Amendment and that the pretrial order (and Rule 16 of the Federal Rules of Criminal Procedure, on which the order was based) was violated by the government's failure to give the expert's report to the defense before the second trial.

The Fifth Amendment argument is foreclosed by *Gilbert v. California*, 388 U.S. 263, 266-67 (1967), which held that a handwriting sample was physical rather than testimonial evidence and therefore not protected by the Fifth Amendment. Of course, if a defendant were told to give a handwriting sample in the form of a confession dictated by the police the sample could not be used as evidence of the truthfulness of the confession. But disguising your handwriting is not testimony; it is an effort to prevent the government from obtaining physical evidence to which it is entitled. If the police drew blood and the defendant poured the vial of blood down the drain, the police could testify to his conduct; it was the same here.

Rule 16(a)(1)(D) of the Federal Rules of Criminal Procedure requires the government to turn over to the defendant the results of tests "upon request of a defendant." Shively's counsel knew that the government wanted to introduce the evidence of his alleged disguising of his handwriting, because the government had tried to do so at the first trial, yet he made no request for the expert's report until at the second trial the government again moved to be allowed to introduce the evidence and the court granted the motion. At this point counsel moved for a continuance, which would have been disruptive and

which the district judge was not required to grant. Although it would have been better if the government had furnished the expert's report unasked to defense counsel before the start of the second trial, the district judge's refusal to grant a continuance was not reversible error. Cf. *United States v. Wolfish*, 525 F.2d 457, 460-61 (2d Cir. 1975) (per curiam). Counsel was able to cross-examine the expert effectively even though he lacked access to the expert's report; and while the introduction of this testimony may have added a somewhat lurid note to the trial, the evidence of Shively's willfulness—the only issue to which the testimony was relevant—was overwhelming without it. The testimony was, at worst, harmless error.

To summarize, we reverse Pardee's conviction of violating 18 U.S.C. § 1014 and Shively's conviction of having aided and abetted that violation, with directions to enter judgments of acquittal; but we affirm both men's convictions for conspiracy, and Shively's conviction for having violated 18 U.S.C. § 656. Although the district judge imposed consecutive sentences on each count, we shall remand to give the judge an opportunity, if he desires, to resentence one or both defendants. Since a sentence for one offense could be influenced (and properly so) by the judge's knowledge that the defendant was guilty of another offense as well, we think it the better practice, when one count is set aside on appeal, to give the sentencing judge a chance to reconsider his sentence on the remaining, valid counts.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

Opinion by Judge Posner

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit

10

Chicago, Illinois 60604

August 8, 1983

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. MAX ROSEN, Senior Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 82-2192

vs.

Nos. 82-2436

GARY L. SHIVELY and G. WINFIELD PARDEE,
Defendant-Appellant.

Appeals from the United States
District Court for the Southern
District of Illinois, Benton
Division.
No. 82 CR 40005
Judge James L. Foreman

This cause was heard on the record from the United States District
Court for the Southern District of Illinois,
Benton Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by
this Court that the judgment of the said District Court in this cause appealed
from be, and the same is hereby AFFIRMED in part, REVERSED in part, and
the case is REMANDED, in accordance with the opinion of this
Court filed this date.

* The Honorable Max Rosenn, Senior Circuit Judge of the United
States Court of Appeals for the Third Circuit, is sitting by
designation.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 5, 1983

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. MAX ROSEN, Senior Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 82-2192

vs.

GARY L. SHIVELY,
Defendant-Appellant.

} Appeal from the United
States District Court
for the Southern District
of Illinois,
Benton Division.

No. 82 CR 40005
James L. Foreman, Judge.

ORDER

On August 24, 1983, defendant-appellant Gary L. Shively filed a petition for rehearing. All of the judges on the original panel have voted to deny the rehearing. The petition is therefore DENIED.

*Hon. Max Rosenn of the Third Circuit, sitting by designation.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,)
Plaintiff,)
vs)
GARY L. SNIVELY)
Defendant(s).)

CRIMINAL NUMBER 82-40005-01

CITY OF CHICAGO
CLERK OF DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

FEB 21 1982

FILED

ORDER FOR PRETRIAL DISCOVERY AND INSPECTION

IT IS HEREBY ORDERED by the Court that:

(1) Within five (5) days after the arraignment in the above entitled cause, the United States Attorney and the Defendant's attorney shall confer and, upon request, the government

shall (a) Permit Defendant's attorney to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government;

(b) Permit Defendant's attorney to inspect and copy or photograph any relevant results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government;

(c) Permit Defendant's Attorney to inspect and copy or photograph any relevant recorded testimony of the Defendant before a grand jury;

(d) Permit Defendant's attorney to inspect and copy or photograph books, papers, documents, tangible objects, buildings, or places which are the property of the Defendant and which are within the possession, custody, or control of the government;

(e) Permit Defendant's attorney to inspect and copy or photograph the Federal Bureau of Investigation Sheet indicating Defendant's prior criminal record;

(f) Permit Defendant's attorney to inspect, copy, or photograph any evidence favorable to the Defendant.

(2) If, in the judgment of the United States Attorney, it would not be in the interest of justice to make any one or more disclosures as set forth in paragraph (1) as requested by Defendant's counsel, disclosure may be declined. A declination of any requested disclosure shall be in writing, directed to Defendant's counsel, and signed personally by the United States Attorney or the First Assistant United States Attorney, and shall specify the types

of disclosures that are disclosed. If the Defendant seeks to challenge the designation, he shall proceed pursuant to subsection (3) below:

(3) If additional discovery or inspection is sought, Defendant's attorney shall confer with the appropriate Assistant United States Attorney within ten (10) days of the arraignment with a view to satisfying these requests in a cooperative atmosphere without recourse to the Court. The request may be oral or written and the United States Attorney shall respond in like manner.

(4) In the event Defendant thereafter moves for additional discovery or inspection, the motion supported by a brief shall be filed within ten (10) days of the arraignment. It shall contain:

a--the statement that the prescribed conference was held;

b--the date of said conference;

c--the name of the Assistant United States Attorney with whom conference was held; and

d--the statement that agreement could not be reached concerning the discovery or inspection that is the subject of Defendant's motion.

(5) Any duty of disclosure and discovery set forth above is a continuing one and the United States Attorney shall produce any additional information gained by the government.

(6) Any disclosure granted by the government pursuant to this Order of material within the purview of Rules 16(a) and 16(b), Federal Rules of Criminal Procedure, shall be considered as relief sought by the Defendant and granted by the Court.

(7) In the event Defendant desires to file any other motion, his motion supported by a brief or memorandum of law shall be filed within ten (10) days from the date of the filing of Defendant's motion to reply supported by a brief or memorandum of law.

(8) All motions shall be filed in duplicate with the Clerk and in addition a copy thereof shall be served on all counsel of record. Proof of service by mail or otherwise shall appear on the motion.

DATED: February 26, 1962

/s/ Kenneth J. Meyers
United States Magistrate
Southern District of Illinois

STATE OF ILLINOIS)
) SS
COUNTY OF ST. CLAIR)

RECORDED
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A F F I D A V I T

FILED

WILBURN R. KINCAID, being duly sworn, deposes and says:

1. That he is a Special Agent with the Federal Bureau of Investigation investigating bank fraud and embezzlement involving the First National Bank of Marshall, Marshall, Illinois.
2. That Gary L. Shively is a target of the investigation and has previously provided certain handwriting specimens to the Grand Jury which were forwarded to a Handwriting Examiner with the Federal Bureau of Investigation in Washington, D.C.
3. The Handwriting Examiner has informed him that the handwriting specimens furnished by Gary L. Shively have unexplained distortions and the specimens may indicate an attempt to conceal true handwriting.
4. Additional handwriting is needed to identify the writer or writers of crucial documents and the additional handwriting is not being sought for harassment purposes.

Wilburn R. Kincaid

Subscribed and sworn to before me this 16th day of November, 1981.

James M. Licavito
NOTARY PUBLIC